Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	
v.	)	File No. CSR-8972-P
COMCAST CABLE COMMUNICATIONS, LLC, and **COMCAST CORPORATION**,	)	
Defendants.	)	

REPLY OF BEIN SPORTS, LLC TO OPPOSITION TO APPLICATION FOR REVIEW

Comcast cannot divert the Commission's gaze from the essential unfairness of the *Order*. The *Order* credited a threadbare showing by Comcast that carriage of beIN is loss making to Comcast. By denying a merits hearing to a complainant that had made its *prima facie* case, the *Order* prevented beIN from making the rebuttal of that showing that the *Order* itself admonished beIN was necessary. The *Order* takes Kafka's story "Before the Law" one step further. beIN has not only been told that the door of the law will never open, but that the key lies just beyond the locked door, never to be reached. Comcast insists that its say-so need not be second-guessed. But Commission precedent is not in accord.

Never before has the Bureau held that the complainant had made a *prima facie* case and immediately denied the complaint. The point is not that the Bureau does not have the authority to resolve a proceeding without a hearing. It does. But to do so while agreeing with the complainant's *prima facie* case is arbitrary and capricious. It is therefore unsurprising that the Commission has never done it or countenanced it. In fact, in *Herring*, the Commission faulted the Bureau for retracting a delegation to the ALJ. The Commission concluded that those complaints, like most complaints, were "best resolved through hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau."

Herring Broadcasting, Inc. d/b/a WealthTV, et al. v. Time Warner Cable, Inc., et al. (collectively "Herring Parties"), *Order*, 24 FCC Rcd. 1581, 1582 ¶ 2 (2009) ("*Herring*"). Comcast's attempt to distinguish *Herring* on the grounds that the Bureau had already designated the complaints at issue for hearing, before reversing that decision, misses the point. Opp. at 7. There, the Bureau had first done the right thing, then the wrong thing. Here, the Bureau did the wrong thing from the start. There is no discernible difference.

In fact, the teaching of *Herring* is equally applicable here. The "salient fact" in *Herring*—that "each owner of the cable-affiliated MOJO network has refused to carry WealthTV, and a discrimination claim requires the Commission to assess why these cable operators have refused to carry WealthTV but have decided to carry MOJO"—is equally disputed here: the record lacks any evidence as to why Comcast broadly carries NBC Sports. Herring Parties, *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14804 ¶ 34 (2008).

Comcast complains that the *GSN* ALJ hearing dragged on for many years, but ignores that the ALJ is subject to a time limit of no more than 240 days, 47 C.F.R. § 0.341(f)(1)(i), which can be strictly enforced, and that over a year of the delay in *GSN* was simply due to an abeyance agreement reached by the parties themselves. As for the decision of the Commission and other agencies to resolve factual disputes in certain proceedings on paper alone,[1] it does not apply to program carriage complaints, and in any event does not justify the Bureau's decision on an insufficient record. In the prior words of Comcast itself, "due process, the Commission's program carriage procedures, and the integrity of the Commission's processes require a trial-type

[1] Many of the cases cited by Comcast for this proposition involved proceedings where discovery or a hearing had already been conducted, or where the Commission mandated disclosure of certain documents in lieu of party-driven discovery. *See, e.g.* Am. Tel. & Tel. Co. Revision to Tariff FCC No. 267, *Memorandum Opinion and Order*, 67 FCC 2d 1195, 1195 ¶ 1 (1978).

hearing[.]" Emergency Application for Review of Comcast Corporation, MB Docket No. 08-214, at 1 (Dec. 30, 2008).

Comcast claims that beIN "stipulated" that the Second Complaint should be decided on the merits based on the written record. But Comcast forgets that all relevant information that is not publicly available is in its custody. If the Bureau had concluded that Comcast's business reasons showing was implausible, there was no additional information that Comcast could have hoped to secure by discovery in order to improve its showing. In that case, it would have been appropriate to decide the case on the merits without discovery. But here, by the *Order*'s own admission, rebuttal of Comcast's showing requires "expert evidence to the effect that . . . Y number would leave Comcast in the absence of broader carriage," information that beIN does not have. *Order* ¶ 28 n.113 (citation omitted). Nor is judicial estoppel remotely applicable. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). This is the unusual case in which the Bureau identified the "rather obvious" evidence that would be necessary for beIN to rebut Comcast's business reasons showing, even as it acted to prevent beIN from obtaining it.

Comcast argues that, as a matter of law, it is irrelevant whether Comcast applies the same profitability analysis to its own affiliates. Not so, states the D.C. Circuit: Tennis Channel could have shown a net benefit to Comcast through evidence that "the incremental losses from carrying Tennis in a broad tier would be the same as or less than the incremental losses Comcast was incurring from carrying [Comcast-affiliated] Golf and Versus in such tiers."[2]

Comcast ignores that beIN did in fact provide substantial evidence to demonstrate material and significant factual disputes as to whether Comcast would obtain a net benefit from

[2] *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 986 (D.C. Cir. 2013) ("*Tennis Channel*"); *see also* Game Show Network, LLC v. Cablevision Systems Corp., *Memorandum Opinion and Order*, 32 FCC Rcd. 6160, 6184 ¶ 76 (2017) (tiering of other networks relevant).

carrying beIN on both the terms offered by beIN and by Comcast. Indeed, Comcast misunderstands what constitutes evidence in program carriage complaint proceedings. beIN did not simply argue that there were 2.4 million visitors to its website dedicated to the Comcast dispute—beIN supported this argument with a declaration under oath. This constitutes evidence, which calls into question the accuracy of Comcast's viewership analyses, but which the Bureau ignored. 47 C.F.R. § 76.1302(d)(3)(iii). So too is the factual and expert evidence provided by beIN demonstrating that Comcast generally carried beIN in standard definition to the detriment of Comcast's own subscribers, took actions demonstrating the desirability of beIN's programming, failed to demonstrate it engages in the same profitability analyses for NBC Sports, and made inconsistent representations justifying skepticism of its assertions. beIN App. for Review at 18-19.

Comcast resorts to illogical sophistry when it argues that lost revenue from subscribers purchasing the Sports and Entertainment ("S&E") package would be the same if Comcast gave beIN broad distribution on par with NBC Sports as it did in dropping beIN altogether, and therefore it was appropriate for the Bureau to neglect such losses. Opp. at 17-18. Comcast's analysis was based on dropping beIN from the package in which it was then carried, not from some broader package. Had beIN been dropped from a broader package, it is true that some beIN fans would have left the S&E package. But, on the other side of the ledger, the number of subscribers leaving Comcast altogether would necessarily have been larger, as more subscribers would have been exposed to the programming. Comcast does not purport to estimate that number. Comcast's losses from dropping beIN from the S&E package plainly include everyone who pays Comcast less money as a result—whether because she leaves Comcast altogether or because she leaves that package.

Comcast's opposition also leaves the following mysteries unsolved: if Comcast would have lost money under its own December 13, 2017 offer, as it now claims, why did it make that offer? If Comcast would have lost money by opting to continue carriage of beIN under the old agreement, why did it renew? Comcast's intimation that it had blundered and short-changed its own shareholders (citing changes to the video marketplace that supposedly blindsided it and undue "conservat[ism]"), Opp. at 15-16, is implausible. Comcast is no schoolboy; it is probably the most sophisticated company in the space, and it does not hand out money. The only plausible explanation is that Comcast's showing that beIN carriage caused it losses is a falsehood convenient for its litigation position. Comcast relies on *GSN*, where the Commission found that the programmer had failed to prove a net benefit to Cablevision if Cablevision agreed to the broad carriage the programmer had requested. But it is Comcast's benefits showing that suffers from this flaw: Comcast does not compare broad carriage to narrow carriage. It compares narrow carriage to no carriage at all. Comcast never submitted an analysis showing that it stood to lose money from providing beIN to a broader set of Comcast subscribers. In fact, beIN had provided ample evidence of the benefits to Comcast from broadening carriage—what was missing in *GSN*. Second Complaint ¶ 132, Exhibit 10 ¶ 27-32; Reply ¶ 98-118, Exhibit 5 ¶ 14.

Respectfully Submitted,

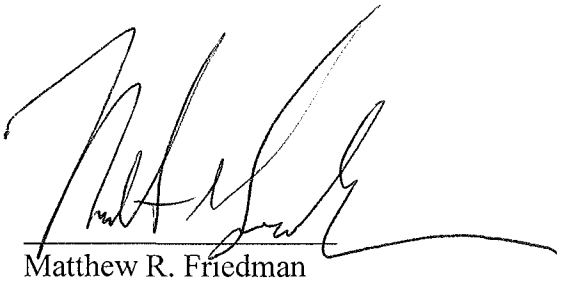
/s/ Pantelis Michalopoulos
Pantelis Michalopoulos
Markham C. Erickson
Matthew R. Friedman
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for beIN Sports, LLC

August 26, 2019

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on August 26, 2019, I caused a true and correct copy of the foregoing Reply of beIN Sports, LLC to Opposition to Application for Review to be served by overnight mail and electronic mail on the following:

Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
Counsel to Comcast Corporation and
Comcast Cable Communications, LLC



Matthew R. Friedman
Steptoe & Johnson LLP